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RACIAL PROFILING: CONTEXT AND DEFINITION

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TABLE OF CONTENTS

INTRODUCTION	1
1 RIGHTS IN QUESTION	1
1.1 Right to equality.....	1
1.2 Other protected rights	3
2 RACIAL PROFILING: ORIGIN AND COMMON DEFINITIONS	4
2.1 Origin	4
2.2 Some common definitions.....	7
3 CASE LAW IN CANADA AND QUÉBEC.....	11
4 MEASURES AGAINST RACIAL PROFILING.....	12
5 DEFINITION OF RACIAL PROFILING BY THE COMMISSION.....	13

INTRODUCTION

The Commission des droits de la personne et des droits de la jeunesse¹ is required to promote and uphold, by every appropriate measure, the principles enunciated in the *Charter of human rights and freedoms*, and its responsibilities include making non-adversary investigations, on its own initiative or following receipt of a complaint, into any situation which appears to the Commission to be a case of discrimination.²

The Commission's investigation division has recently received several complaints concerning discrimination based on race, or ethnic or national origin, allegedly exercised by people in situations of authority, a form of discrimination often described as racial profiling. An advisory committee, made up of professionals working at various Commission divisions (legal affairs, investigations, research and planning, communications) has met several times to discuss the files concerned.

It has become clear that there is an urgent need for the Commission to adopt its own official definition of racial profiling, for use by the investigations division.

This document is intended to meet this need by proposing a definition of racial profiling that can be used, in particular, by investigators. It is preceded by a brief review of the prevailing context.³

I RIGHTS IN QUESTION

I.1 Right to equality

The right to equal recognition and exercise of rights and freedoms (often referred to as the "right to equality") is a principle recognized in international legal instruments and also in the Canadian and Québec charters of rights, which are generally the first documents invoked in claims of racial profiling.

¹ Referred to throughout as the "Commission".

² Section 71 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12, referred to throughout as the "Charter".

³ For a more exhaustive study, see « *Profilage racial* » *tour d'horizon*, by Michèle Turenne, advocate, with assistance from Noël Saint-Pierre, advocate, a paper presented on June 4, 2004, at the cultural communities workshop organized as part of the annual convention of the Québec Bar Association. *Second edition, July 2004*, <http://www.cdpdj.qc.ca>.

Article 7 of the *Universal Declaration of Human Rights*⁴ states as follows:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

The same principle is found in the *International Covenant on Civil and Political Rights*⁵ in Article 26:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Section 15(1) of the *Canadian Charter of Rights and Freedoms*⁶ states as follows:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Like the main international and national texts dealing with human rights, the Québec *Charter* states in its Preamble that “all human beings are equal in worth and dignity, and are entitled to equal protection of the law.”

Section 10 states that:

“Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.”

Sections 10.1 adds:

“No one may harass a person on the basis of any ground mentioned in section 10.”

As we will show throughout this document, racial profiling is a form of discrimination. In addition, this infringement of the right to equality has repercussions concerning the exercise of and respect for several other rights protected by the Charter.

⁴ United Nations, G.A. Res. 217 (III), UN GAOR, 3rd Sess., Supp. n^o. 13, U.N. Doc. A/810 at 71 (1948).

⁵ 2200 A (XXI) dated December 16, 1966.

⁶ *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

I.2 Other protected rights

The right to dignity is generally one of the rights affected in cases of discrimination, including racial profiling.

The Preamble to the *Universal Declaration of Human Rights*⁷ reads as follows:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
[...].”

And the Preamble to the *International Covenant on Civil and Political Rights*⁸ contains a similar principle:

“Considering that, in accordance with the principles proclaimed in the *Charter of the United Nations*, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Recognizing that these rights derive from the inherent dignity of the human person,
[...].”

Section 4 of the Québec Charter states that:

“Every person has a right to the safeguard of his dignity, honour and reputation.”

In a Supreme Court of Canada decision, Wilson J. in *R. v. Morgentaler*⁹ expressed the following opinion:

“The idea of human dignity¹⁰ finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.”

The other rights often invoked in cases of racial profiling are the right to life, liberty and security of the person,¹¹ the right to respect for private life¹² and several other legal guarantees and judicial rights.¹³

⁷ United Nations, G.A. Res. 217 (III), UN GAOR, 3rd Sess., Supp. n° 13, U.N. Doc. A/810 at 71 (1948).

⁸ (1976) 999 R.T.N.U. 171.

⁹ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, p. 166.

¹⁰ Important note: In this decision, the comments concerning the right to dignity (not specifically mentioned in the Canadian Charter) are based on an analysis of section 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

¹¹ Canadian Charter, section 7, cited above, note 10; Québec Charter, section 1: “Every human being has a right to life, and to personal security, inviolability and freedom.” [...].”

2 RACIAL PROFILING: ORIGIN AND COMMON DEFINITIONS

2.1 Origin

Racial profiling has been denounced in the United States since the 1970s, when various policies were based on the assumption some types of crime were more likely to be committed by individuals belonging to particular ethnic groups.¹⁴ Initially, individuals were targeted by this form of discrimination as part of a program to fight organized crime and drug trafficking known as “Operation Pipeline”.¹⁵

The practice was introduced into Canada in the 1990s, after members of the Royal Canadian Mounted Police received training in the United States.¹⁶ The most common victims of racial profiling were Blacks, Hispanics and Natives. However, since September 11, 2001, Arabs and Muslims have also been targeted.¹⁷

¹² Québec Charter, section 5: “Every person has a right to respect for his private life.”

Canadian Charter, section 8: “Everyone has the right to be secure against unreasonable search or seizure.” This has been interpreted in the case law as covering the right to protection of privacy.

¹³ More specifically, sections 7, 8 (quoted above) and 9 of the Canadian Charter are often mentioned:

Section 9: “Everyone has the right not to be arbitrarily detained or imprisoned.”

The following provisions of the Québec Charter may apply:

Section 23: “Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.” [...].”

Section 24: “No one may be deprived of his liberty or of his rights except on grounds provided by law and in accordance with prescribed procedure.”

Section 24.1: “No one may be subjected to unreasonable search or seizure.”

Section 25: “Every person arrested or detained must be treated with humanity and with the respect due to the human person.”

Section 28: “Every person arrested or detained has a right to be promptly informed, in a language he understands, of the grounds of his arrest or detention.”

¹⁴ See: ACLU of Northern California, “Operation Pipeline”, *Executive Summary*, Task Force on Government Oversight (September 1999), <http://www.aclunc.org/discrimination/webb-report.html>; *Summit on Policing, Race Relations and Racial Profiling*, Canadian Race Relations Foundation, Toronto, November 2002.

¹⁵ A US federal policy introduced by the DEA (Drug Enforcement Administration). The policy was used to support discriminatory practices by law enforcement agencies, especially on highways and at US customs posts, to identify potential drug traffickers. See: ACLU of Northern California, *op. cit.*, note 14.

¹⁶ “Operation Pipeline and Racial Profiling” (2002), 1 *Criminal Reports* (6th) 52-55; David M. Tanovich, “Using the Charter to Stop Racial Profiling: the Development of an Equality Based Conception of Arbitrary Detention”, (2002) 40 *Osgoode Hall Law Journal* p. 152.

¹⁷ See: Emerson Douyon, « L’impact du 11 septembre sur les communautés ethnoculturelles au Canada », in *Terrorisme, droit et démocratie. Comment le Canada est-il changé après le 11 septembre ?*, Institut canadien d’administration de la justice, Éditions Thémis, 2002, p. 193-197.

Racial profiling may result from practices that have received a degree of official approval, or from discriminatory legislation such as the *Antiterrorism Act*,¹⁸ which may have a disproportionate effect on individuals from certain origins, especially Arab nations, and the *Immigration and Refugee Protection Act*,¹⁹ which allows immigrants (even with permanent resident status) who have been convicted of certain offences to be sent back to their country of origin regardless of the number of years spent in Canada, their links with their country of origin, or their family ties in Canada.²⁰

We cannot ignore the fact that some studies and critical surveys still present racial profiling as a rational form of criminal profiling, since statistics and observations have shown that people from certain groups are more likely to commit certain types of crime.²¹ Heather Mac Donald, in an article called *The Myth of Racial Profiling*,²² states as follows:

“The anti-profiling crusade thrives on an ignorance of policing and a willful blindness to the demographics of crime.

[...] The ultimate question in the profiling controversy is whether the disproportionate involvement of blacks and Hispanics with law enforcement reflects police racism or the consequences of disproportionate minority crime.”

¹⁸ (S.C. 2001, c. 41). See also: Canadian Bar Association, Submission on the Three Year Review of the *Anti-terrorism Act*, May 2005, <http://www.cba.org/CBA/submissions/pdf/05-28-eng.pdf>;

Ligue des droits et libertés, *Nous ne sommes pas plus en sécurité; nous sommes moins libres*, January 2004, http://www.liguedesdroits.ca/documents/surveillance/campagne/analyse_fr_rev.pdf;
special edition: proceedings of the seminar held on November 26-27, 2004: *Un monde sous surveillance – Sécurité, libertés civiles et démocratie à l'ère de la guerre au terrorisme*, volume XXIII, n° 1, spring 2005, see in particular Nicole Filion « Tout n'a pas commencé le 11 septembre 2001... », « Déconstruire le discours sécuritaire pour construire un monde “libéré de la misère et de la terreur” », Denis Barette « La loi anti-terroriste en bref », François Crépeau « L'étranger et le droit à la justice après le 11 septembre 2001 », http://www.liguedesdroits.ca/documents/bulletins/bulletin_printemps2005.pdf.

See also: Resolution 04-07-A “Racial Profiling and Law Enforcement” adopted by the Council of the Canadian Bar Association, at its annual general meeting held in Winnipeg (MB), August 14 and 15, 2004, <http://dev.cba.org/cba/resolutions/pdf/04-07-A.pdf>; Selwyn A. Pieters, “Expanding the Boundaries of Human Rights Litigation – Post 9/11, Racial-Profiling and the Impact of the Pieters Settlement”, a paper prepared for the “Spinlaw Conference” (Faculty of Law, University of Toronto, and Osgoode Hall Law School, March 8, 2003).

¹⁹ S.C. 2001, c. 27 (section 33 and following).

²⁰ This results in a double penalty, infringing on several fundamental rights such as the right to life, liberty and security of the person, and has discriminatory overtones to the extent that a disproportionate number of the people expelled are from an ethnic or racial group. See: Open Society Justice Initiative, “Racial Discrimination in the Administration Justice”, presented to the United Nations Committee on the Elimination of Racial Discrimination at its 65th session, August 2004, http://www.justiceinitiative.org/db/resource2?res_id=102142.

²¹ See: Jeffrey Goldberg, “The Color of Suspicion”, *The New York Times Magazine* (June 20, 1999), p. 51-87 quoted in David M. Tanovich, “Using the Charter to Stop Racial Profiling: the Development of an Equality Based Conception of Arbitrary Detention”, (2002) 40 *Osgoode Hall Law Journal* p. 152.

²² *City Journal*, Spring 2001, vol. 11, n° 2, p. 1, http://www.city-journal.org/html/11_2_the_myth.html.

However, as the Ontario Human Rights Commission explains in a report on racial profiling:

“Racial profiling has been justified by arguing that some groups commit a disproportionate amount of crime, relative to their percentage in the population. However, this approach has been argued to be logically flawed, as it is actually more likely that a member of the majority group will have committed the offence. For example, if group A represents 20% of the population but commits 40% of violent crimes and group B represents 80% of the population and commits 60% of violent crimes. It is true that group A commits a disproportionate amount of violent crime. However, if a violent crime takes place, it is still more likely that it was committed by a member of group B – a 6 out of 10 chance. It would therefore make more sense to be looking for someone in group B. A profile that looks for someone in group A will be wrong more than half the time.”²³

US professor Sherry F. Colb,²⁴ commenting on racial profiling in connection with the fight against terrorism, makes the following remark:

“[...] It would, of course, be irrelevant if profiling were to prove as ineffective in the war on terrorism as it has been in the war on drugs [...] It may also be that terrorist from now on will consciously choose people falling outside of any profiled groups to carry out their atrocious objectives [...]”

Racial profiling is, in the final analysis, a reflection of intolerance, misunderstanding, a lack of inter-cultural communication, and prejudice.

From this point of view, the media have a major role to play in the perception, within society of a whole, of people of a certain “race”.

For example, Scot Wortley²⁵ notes that in general, the discourse is fragmented around the idea of “us” and “them”; people from minority groups are represented as the most likely assailants; an individual crime committed by a White person is reported as an individual pathology, while an individual crime committed by a person of a particular “race” is interpreted as a cultural trait.

At this point, it is appropriate to review existing definitions of racial profiling.

²³ Ontario Human Rights Commission, *Paying The Price: The Human Cost Of Racial Profiling – Inquiry Report*, 2003, footnote 30. Based on: T. Wise, “Racial Profiling and It’s [sic] Apologists” *Z Magazine* (March 2002), online: *Z Magazine* <<http://www.zmag.org/Zmag/articles/march02wise.htm>>.

²⁴ Professor at the Rutgers Law School in Newark. *The New Face of Racial Profiling: How Terrorism Affects the Debate*, October 10, 2001, <http://writ.news.findlaw.com/colb/20011010.html>.

²⁵ Scot Wortley, “Misrepresentation or Reality: The Depiction of Race and Crime in the Canadian Print Media”, in B. Schissel and C. Brooks (Eds.), *Critical Criminology in Canada: Breaking the Links Between Marginality and Condemnation*, Halifax, Fernwood, 2003, 87-111.

2.2 Some common definitions

In the United States, most of the common definitions of racial profiling are connected to interventions by police officers to target individuals, with no valid reason, mainly on the basis of their race or ethnicity.²⁶

The African Canadian Legal Clinic, based in Toronto, has adopted the following definition:

“Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.”²⁷

The broader definition of racial profiling given by the Ontario Human Rights Commission includes:

“**any action** undertaken for **reasons of safety, security or public protection** that relies on **stereotypes** about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment [...] age and/or gender can influence the experience of profiling [...].

[...] racial profiling differs from criminal profiling which isn't based on stereotypes but rather relies on actual behaviour or on information about suspected activity by someone who meets the description of a specific individual. In other words, criminal profiling is not the same as racial profiling since the former is based on objective evidence of wrongful behaviour while racial profiling is based on stereotypical assumptions.”²⁸

In Québec, in the summer of 2003, following meetings with representatives of community action groups that had contacted the Minister of Relations with the Citizens and Immigration, Michelle Courchesne, concerning the problems faced by several ethnic groups in dealing with the police and other officials, the Minister announced the creation of a working group on racial profiling.²⁹

²⁶ For example, the definition given in Deborah Ramirez, Jack McDevitt and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems – Promising Practices and Lessons Learned*, Northeastern University, 2000:

“[...] racial profiling is defined as any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.”

²⁷ See the website <http://www.aclc.net/>.

²⁸ *Op. cit.*, note 23, p. 6.

²⁹ The first meeting of the working group, made up of representatives of the MRCI (ministère des Relations avec les citoyens et de l'Immigration, now known as the ministère de l'Immigration et des Communautés culturelles, or MICC), government institutions and community organizations, was held on October 27, 2003. Since then, seven other meetings have been held. Because of the scope of the problem, the ministère de la Sécurité publique (MSP) was asked to co-chair the working group in the fall of 2004 with the MRCI.

From the first meeting of the working group on racial profiling, the participants and departmental representatives agreed to work on the principle that racial profiling existed³⁰ and was not a new phenomenon,³¹ but they were unable to assess its extent because of a lack of recent studies.³² The work could

³⁰ This is also the position of the Ontario Human Rights Commission, as stated in the report cited above, note 23, p. 11-12.

³¹ See the following studies published by the Commission des droits de la personne:

- *Enquête sur les allégations de discrimination dans l'industrie du taxi à Montréal, 1984; Comité d'enquête sur les relations entre les corps policiers et les minorités visibles et ethniques (Rapport Bellemare), Enquête sur les relations entre les corps policiers et les minorités visibles et ethniques : rapport final du Comité d'enquête à la Commission des droits de la personne du Québec, 1988; Mise en application des recommandations du Rapport d'enquête sur les relations entre les corps policiers et les minorités visibles et ethniques, 1989.*

See also:

- Québec (Province) Bureau du coroner (Rapport Yarosky), *Rapport du coroner suite à une enquête sur le décès de monsieur Marcellus François survenu le 18 juillet 1991 à l'Hôpital général de Montréal, résultant de blessures subies lors d'une opération policière du Service de police de la Communauté urbaine de Montréal, 1992; Groupe de travail sur les relations entre les communautés noires et le Service de police de la Communauté urbaine de Montréal (Rapport Corbo), Une occasion d'avancer: rapport du Groupe de travail du ministre de la Sécurité publique du Québec sur les relations entre les communautés noires et le Service de police de la Communauté urbaine de Montréal, 1992; Albert Malouf, *Rapport de l'inspection de l'administration du Service de police de la Communauté urbaine de Montréal, de ses activités et celles de ses membres*, ministère de la Sécurité publique, 1994;*
- Denise Helly, *Revue des études ethniques au Québec, 1977-1996*, INRS Centre Culture et Société, November 1997, prepared by Citizenship and Immigration Canada and Immigration et Métropoles.

³² Some recent studies and circumstances tend to show that racial profiling still exists:

- Emerson Douyon writes (« Groupes minoritaires et systèmes de justice », in *Dialogues sur la justice : le public, le législateur, les tribunaux et les médias*, Éditions Thémis, 2002, p. 305-306): “At the entrance to the system is the police force, which selects the cohorts. Are police forces in Québec racist in the way they exercise informal social control in their relations with minority groups [...]? Since the raw materials on which the criminal justice system operates are mainly selected by the police, the question appears relevant.” [Our translation]
- People from the cultural communities, especially Blacks and Natives, are over-represented in the prison population. Blacks represent 6.4% of the offenders under federal responsibility, although they make up only 2.23% of the total population in Canada. The situation of Native people is even more alarming, since they represent 16.1% of the federal prison population, but only 3.29% of the total population. See: Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release: Statistical Overview*, December 2004, http://www.psepc.gc.ca/publications/corrections/pdf/stats04/49569_Ang_finnal.pdf.

The situation is explained by many different factors (unfavourable economic and social conditions, intercultural communication problems, etc.), but the impact of racial profiling should not be underestimated. On this topic, see the report by the Open Society Justice Initiative (*op. cit.*, note 20) which remarks: “Where data are available, disturbing patterns suggest that racial and ethnic minorities in certain countries may be charged with more serious crimes. When convicted of crimes they often receive harsher penalties than others convicted of the same crime.” p. 6.

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continue, however, since immediately the group defined a conceptual framework before focusing on the more pragmatic questions of actions and measures.

Based on definitions from Ontario and the United States, a definition of racial profiling proposed jointly by the representative of the Commission and community action workers was selected:

“Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on factors such as race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.”³³ [Our translation]

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- Also noteworthy are the research results of Lionel Bernard, « La surreprésentation des jeunes haïtiens dans le système québécois de protection de la jeunesse » (under the *Youth Protection Act*, R.S.Q., c. P-34.1), *Revue Intervention* (issue July 20, 2004). The author explains: “Despite the presence of factors such as a lack of stable parental income and a lack of food (as the main factors placing children in danger), the decisions are mainly based on keeping bad company, displaying delinquent behaviour and failing to adapt to school.” p. 120. [...] “Not only are young Haitians reported more often than young Quebecers, but once they are drawn into the system they are more likely to incur disadvantages such as emergency withdrawal from their family [...] or court proceedings” p. 122. The author concludes: “[...] among other things, [...] the “visibility” of the behaviour displayed by young Haitians and the limits of social practices for people living in poverty [...] appear to contribute to the discrimination faced by young Haïtiens [...]” p. 123. [Our translation]
 - See also: National Film Board of Canada, “Zero tolerance” (March 2004), a documentary directed by Michka Saäl on racial profiling, especially in Greater Montréal.

The anecdotal evidence presented by the members of the working group included the following:

- The members of several ethnic communities (Black, Hispanic, Arab, Asian, etc.) appear to attract attention from the police simply by being present in the evening in certain public areas of Montréal neighbourhoods;
- Members of the Arab and Muslim communities have experienced more harassment, especially by the police, since September 11, 2001. See: Denise Helly, “Are Muslims discriminated against in Canada Since September 2001?” in *Journal of Canadian Ethnic Studies*, Fall 2004;
- Since the 2004 juvenile prostitution scandal in Québec City, members of the Black community have experienced more police harassment;
- Security officers in the Montréal metro system have been accused of systematic harassment of young people from visible minorities.

³³ The Montréal city police force (one of the members of the working group), in an intervention policy « Politique d’intervention numéro 259-1, *Le profilage racial et illicite* » that came into force on March 22, 2004, and is designed to prevent racial profiling, includes a similar definition for use in its operations:

“Illicit racial profiling is defined as any action instigated by persons in authority against any individual or group, for reasons of public security or protection and solely on the basis of factors such as race, ethnic origin, colour, religion, language, social status, age, sex, disability, sexual orientation, or political convictions, that exposes the individual to differential scrutiny or treatment without actual grounds or reasonable suspicion.” [Emphasis added; our translation]

The definition was present to the National Assembly on March 23, 2004, by Michelle Courchesne to mark March 21, International Day for the Elimination of Racial Discrimination.³⁴

At the federal level, Bill C-296, *An Act to Eliminate Racial Profiling*,³⁵ was tabled for first reading in the House of Commons on November 18, 2004, by MP Libby Davies of the New Democratic Party. Section 4(2) of the Bill states that “Proof that the routine investigatory activities of an enforcement officer have had a disparate impact on racial, religious or ethnic minorities is, in the absence of evidence to the contrary, proof that the officer has engaged in racial profiling.” [Emphasis added]

The notion of “disparate impact” is interesting. In the opinion of Professor Scot Wortley of the University of Toronto,³⁶ definitions of racial profiling, including that put forward by the Ontario Human Rights Commission, could be improved by specifying that racial profiling also includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background.³⁷

³⁴ *Journal des débats*, March 23, 2004, 15h10:

Ms Michelle Courchesne: “I should state from the outset that the question of racial profiling must be seen and recognized as such in all of its dimensions.

I would like to read you the definition that has achieved a consensus – for the first time – among the members of the working group and every word of which, I can assure you, has been carefully weighed and selected [...]” [Our translation]

³⁵ http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/private/C-296/C-296_1/C-296_cover-F.html.

³⁶ Expressed during the conference « La criminalisation des jeunes – les défis de la prévention auprès des minorités visibles » held in Montréal on February 10 and 11, 2005, under the responsibility of the Centre de recherche-action sur les relations raciales (CRARR).

³⁷ A commonly quoted example is the fact that Black drivers in the United States are far more likely than Whites to be pulled over for routine checks. See: David Harris, “Driving While Black : Racial Profiling on our Nation’s Highways”, *An ACLU Special Report* (June 1999)
<http://www.aclu.org/RacialEquality/RacialEquality.cfm?ID=18163&c=133C>.

See also: Scot Wortley, “The Good, the Bad and the Profiled: Race, Deviant Activity and Police Stop and Search Practices”, Centre of Criminology, University of Toronto, Annual Woodsworth College Public Lecture, November 7, 2002; Scot Wortley, *Racial Differences in Customs Searches at Pearson International Airport: Results from a Pilot Survey* (a report prepared for the African Canadian Legal Clinic, 2002); E. James, “Up to No Good”, in V. Satzewich (Ed.), *Racism and Social Inequality in Canada: Concepts, Controversies & Strategies of Resistance* (Toronto, Thompson Educational Publishing, 1998), p. 157; Scot Wortley, “The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice”, a paper presented at the 48th annual conference of the American Society of Criminology, November 1997; Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (Toronto: Queen’s Printer for Ontario, 1995).

3 CASE LAW IN CANADA AND QUÉBEC

Although an exhaustive review of the case law cannot be attempted here, several decisions have mentioned racial profiling in criminal proceedings as grounds for a new trial, such as *R. v. Richards* (1999), 26 CR (5th) 286 (Ont. CA), or to exclude incriminating evidence,³⁸ such as *R. v. Brown*, (2003-04-16) ONCA C37818; *R. v. Khan* [2004] O.J. n° 3819; and *La Reine c. Campbell, Alexer*, C.Q. Montréal, n° 500-01-004657-042-001, 27 January 2005, Westmoreland-Traoré J.

In the field of civil law, in the decision *Johnson*³⁹ made under Nova Scotia's *Human Rights Act*,⁴⁰ the Board of Inquiry concluded that the plaintiff's car was pulled over primarily because of the race of the driver (who was Black), and that this constituted discrimination in the form of racial profiling. The Board of Inquiry order the Halifax Regional Police Service to pay the plaintiff damages of over \$10,000. The decision of the Board of Inquiry also included detailed orders to correct systemic discrimination and racial profiling within the police service.⁴¹

Another case, *Selwyn Pieters*,⁴² deserves attention. The plaintiff, a Black Canadian, complained to the Canadian Human Rights Tribunal⁴³ that the Canada Customs and Revenue Agency had subjected him to differential treatment (a search of his baggage without reasonable cause) when he returned to Canada after a trip to the United States, solely because of his race. Article I of the Minutes of Settlement between the two parties remains confidential, and the nature and amount of the damages awarded cannot be presumed. However, the Canada Customs and Revenue Agency is required to set up a pilot project to examine the extent, if any, of racial or ethnic profiling by its officers.⁴⁴ In the meantime, the Minutes

³⁸ Under section 24(2) of the Canadian Charter: "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

See the Canadian Charter: section 8, cited above, note 12; section 9, cited above, note 13; section 15, cited above, note 6.

³⁹ *Kirk Johnson v. Michael Sanford and Halifax Regional Police Service*, Philip Girard, Board of Inquiry, decision dated December 22, 2003, <http://www.gov.ns.ca/humanrights/publications/KJdecision.pdf>.

⁴⁰ *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended 1991, c. 12.

⁴¹ Among other things, the decision orders the Halifax Regional Police Service to hire two independent consultants to analyse and report publicly on the policies and practices affecting the members of minority groups, and to take the necessary action in light of the observations made. More specifically, referring to the facts reported in the decision, the police service must carry out a survey (statistical data) to assess the role played by the race factor when drivers are stopped by the police on the highway.

⁴² *Pieters v. Dept of National Revenue – Minutes of Settlement T650/3801*, Canadian Human Rights Tribunal, January, 30, 2002.

⁴³ Under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

⁴⁴ In an open letter dated March 20, 2005, to Mr. Irwin Cotler, federal Minister of Justice, and Ms Anne McLellan, federal Minister of Public Safety and Emergency Preparedness, Selwyn Pieters denounced government inertia on the question of racial profiling and the fact that the terms of the settlement had not yet been implemented. See: <http://www.geocities.com/CapitolHill/2381/CanadaCustomsandRevenueAgency/cbsaintransigence.html>.

of Settlement state that the Agency must, beginning in March 2002, hire an anti-racism expert to provide anti-racism and cultural diversity training to all Customs officers.

4 MEASURES AGAINST RACIAL PROFILING

A consensus quickly emerged among the members of the working group set up by the MICC that, in addition to court challenges, the Québec plan of action against racial profiling should draw inspiration from the United States and the approach of the Ontario Human Rights Commission.⁴⁵ The main lines of action were defined as follows⁴⁶.

- Inform and raise awareness among the general public, groups vulnerable to racial profiling and institutional players (government, police, lawyers, judges, security agencies, immigration officers, etc.).⁴⁷
- Identify and prevent situations likely to result in racial profiling. The systematic gathering on information on the physical appearance (age, sex, race, religious markings, etc.) of individuals detained by the authorities could have a dissuasive effect, illustrate the extent of the problem and, if necessary, provide materials for evidence in court.
- Legislate specifically against racial profiling, introduce appropriate criminal and civil penalties, and improve the effectiveness of the system to manage complaints against law enforcement officers.

Also, it is interesting to note that at the federal level: on March 17, 2005, the *Globe and Mail* revealed the contents of a secret report by the federal justice department concerning racial profiling. According to the report, racial profiling by police forces and security services throughout Canada is a “high-profile and pressing issue”. On March 29, the federal government announced a fund of over \$2 million to analyse and combat racial profiling throughout Canada, including Québec.

Furthermore, in Ontario, the police force in Kingston, Ontario, has launched a study, the first of its kind in Canada,⁴⁸ to analyse the frequency and nature of the interventions made by peace officers in public spaces and on public highways on the basis of ethnic background. The preliminary results were released on May 26, 2005, and concluded that racial profiling existed within the Kingston police force, especially with regard to Blacks and Natives. For example, according to the initial analysis, a Black male (men are

⁴⁵ *Op. cit.*, note 23, p. 81 and following.

⁴⁶ To follow up on these proposals, the MRCI organized meetings with the ministère de la Justice, that in turn set up a committee to study possible actions taken under their respective jurisdictions. In addition, authorities at the ministère de l'Éducation (MEQ), the École nationale de police (ENP) and various police forces were consulted. One concrete result has been the inclusion of the concept of racial profiling in professional development sessions for police officers, and in the training provided for future police officers beginning in September 2005.

⁴⁷ Funding must, however, be found to support implementation.

⁴⁸ From October 1, 2003 to September 30, 2004. See the websites:
<http://www.police.kingston.on.ca/Professor%20Wortley%20Report.Kingston.pdf> and
<http://www.police.kingston.on.ca/Bias%20Free%20Policing.pdf>

more frequently stopped than women) aged between 15 and 24 is three times more likely to be stopped by the police than a White male of the same age group, in comparison to the size of each group in the community. According to the author, Scot Wortley,⁴⁹ other analyses and studies must be conducted to determine and make links between the stop-and-search rate and deviant behaviour, based on ethnic groups.

5 DEFINITION OF RACIAL PROFILING BY THE COMMISSION

Considering the above, the Commission believes that:

- racial profiling exists in Québec society, although the extent of the problem cannot be assessed given the lack of recent data from Québec in this area; and
- an official definition of racial profiling must be adopted if various mandates under the Charter are to be pursued effectively.

The definition adopted by the MICC provides an appropriate starting point:

“Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on factors such as race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.” [Our translation]

However, in light of recent developments in this field, the definition should be extended to cover the idea that racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background.

As a result, for the exercise of the responsibilities conferred on it by the Charter, the Commission defines racial profiling as follows:

“Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.”

Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.”

⁴⁹ Associate Professor, Centre of Criminology, University of Toronto.